IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.610 OF 2007
IN
APPEAL (L) NO.1017 OF 2006
IN
AWARD NO.11 OF 1995

Jayabharat Credit Limited,)
a Finance Company, registered)
under the Companies Act, 1956,)
and having its Registered Office)
at Building No.5, Solitaire Park,)
2nd Floor, 151, Vassanji Road,)
Chakala, Andheri (East),)
Mumbai 400 093,)
(previously at French Bank Building)
2nd Floor, Homji Street,)
Mumbai - 400 001.).. Appellants

Vs.

Satish Kumar Goel,)
Supreme Roadlines Corporation,)
107, Veena Chambers, 4th Clive)
Cross Road, Dana Bunder,)
Mumbai - 400 009.).. Respondent

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AND

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(Org.Respondent
No.1)

Vs.

Satish Kumar Goel,)
Supreme Roadlines Corporation,)
107, Veena Chambers, 4th Clive)
Cross Road, Dana Bunder,)
Mumbai - 400 009.).. Respondent
(Org.Petitioner)

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S/Shri Deepen Merchant with Dilip Rai i/b Yogendra M.Kanchan for the appellants.

Shri Subhash Jha with Ms Laxmi Menon i/b Law Global for the respondent/original petitioner.

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CORAM : R.M.S.KHANDEPARKAR &
D.G.KARNIK, JJ

DATED : 12TH APRIL, 2007

ORAL JUDGMENT: (PER R.M.S.KHANDEPARKAR,J)

1. Admit. Heard forthwith, by consent.

2. On 5th March, 2007 while allowing the applicants/appellants to delete Respondent No.2, the parties were clearly informed that the motion would be heard along with the appeal for final disposal. Accordingly, the parties filed affidavit-in-reply, rejoinder, sur-rejoinder and sur sur-rejoinder in the

matter, and we have perused the entire records, and heard at length the learned advocates for the parties.

3. The notice of motion for condonation of delay relates to the period of 252 days in filing the present appeal against the order dated 27th February, 2006 passed by the Learned Single Judge in Arbitration Petition No.282 of 1995.

4. The cause disclosed in the affidavit-in-support of the notice of motion seeking condonation of delay in filing the present appeal relates to the failure on the part of the advocate for the appellants to intimate about the hearing of the matter to the appellants and consequently the matter having proceeded ex parte. It is the case of the appellants that they were not aware of the order till the inquiry was made in that regard and the appeal has been filed immediately after having learnt about the same. It is further case of the appellants that immediately after having learnt about the impugned order, the application for certified copy was filed on 3rd November, 2006. The certified copy of the impugned order was received on 9th November, 2006 and thereafter as the earlier advocate was unwilling to appear for the appellants, the appellants had to

approach another advocate to conduct the case and consequently after approaching the advocate who is presently appearing in the matter, the present appeal was filed in December, 2006. Thereafter, the present notice of motion was taken out in February, 2007 seeking condonation of delay to file the said appeal.

5. On the other hand, the respondent in the reply has categorically asserted that there is no satisfactory cause shown for delay in filing the appeal. It is his further case that the appellants were duly served with the notice of the petition before the Learned Single Judge and the matter was adjourned from time to time on account of failure on the part of the appellants to appear before the Learned Single Judge. The efforts made by the respondent to intimate the advocate for the appellants about the dates of the hearing before the Learned Single Judge proved futile. Neither the appellants nor the advocate for the appellants appeared before the Learned Single Judge. Therefore, no fault can be found with the impugned order. In the circumstances, therefore, no sufficient cause being shown for condonation of delay in filing the present appeal, the notice of motion for condonation of delay should be dismissed.

6. As regards the merits of the case, it is sought to be contended on behalf of the appellants that the appellants being not aware of the dates of the hearing, the appellants could not appear before the Learned Single Judge, and therefore, opportunity should be given to the appellants to putforth their say in the matter. It is also sought to be contended on behalf of the appellants that the impugned order is not sustainable in law, and therefore, the same should be set aside. On the other hand, the learned advocate appearing for the respondent submitted that since the appellants failed to appear before the Learned Single Judge, the Court was left with no alternative than to proceed ex parte and accordingly the impugned order was passed. As the respondent herein, who was the petitioner before the Learned Single Judge, had brought out the defects in the award passed by the arbitrator and since the case putforth by the respondent in that regard was not controverted or denied by the appellants herein, who were the respondents before the Learned Single Judge, no fault could be found with the impugned order. In any case, the appellants having failed to disclose sufficient cause for a long period of delay, there is absolutely no justification for interference in the impugned

order. Reliance is sought to be placed in the decision in the matter of **D. Gopinathan Pillai v. State of Kerala & Anr.,** reported in (2007) 2 SCC 322.

7. As regards the condonation of delay in filing the appeal is concerned, it cannot be disputed that as per Section 5 of the Limitation Act, 1963 the party has to show sufficient cause for delay in approaching the Appellate Court against the order sought to be impugned. In the case in hand, it is the case of the appellants that after having entrusted the matter with their advocate, the appellants were awaiting for necessary guidance in the matter from their advocate and that they were unaware of the dates of the hearing of the matter before the Learned Single Judge and there was no intimation in that regard to the appellants from their advocate. It is further case of the appellants that only on inquiry being made in that regard, the appellants came to know about the petition having been disposed of and immediately thereafter the appellants applied for certified copy of the impugned order and after obtaining the same, the appeal was filed.

8. Before applying the test under Section 5 of the Limitation Act, 1963 to the case in hand, it would

be necessary to take into consideration the defences taken by the respondent in relation to the case putforth by the appellants. Perusal of the affidavit-in-reply dated 28th March, 2007 which is first in point of time on behalf of the respondent in response to the affidavit of the appellants in support of the notice of motion for condonation of delay discloses that the respondent has undoubtedly contended that the appellants have failed to make out sufficient cause for condonation of delay. However, affidavit nowhere discloses any denial of the fact that the appellants were not intimated by their advocate about the dates of the hearing of the matter before the Learned Single Judge and secondly that the appellants were consequently not aware of the dates of the hearing. Undoubtedly, both these facts were within the knowledge of the appellants and could not be within the direct knowledge of the respondent. But it is also to be noted that the solemn assertion sought to be made in that regard by the appellants has not been challenged by the respondent in the affidavit-in-reply. What is sought to be contended is that the respondent on his part had intimated about the dates of the hearing of the matter to the advocate for the appellants as well as the appellants. However, no details have been disclosed in the said

affidavit-in-reply though such same details were attempted to be disclosed in the subsequent affidavit. Nevertheless the fact remains that though the respondent had contended in the affidavit-in-reply that he himself had intimated the dates of the hearing of the matter to the advocate for the appellants as well as the appellants, apart from mere allegation in that regard, no proof of such actual intimation of the dates of the hearings to the appellants has been produced on record. Even assuming that there was such intimation, the fact remains that on the date on which the impugned order was passed, there was nothing on record to doubt the contention which was sought to be raised on behalf of the appellants that the appellants were not aware of the said dates of hearing of the matter before the Learned Single Judge as it was never informed by their advocate. In any case, appearance of the appellants before the Court could have been of much assistance on the said date. It was absolutely necessary for the advocate who was engaged by the party to appear before the Court to assist the Court in deciding the matter. It is nobody’s case that the appellants themselves could have argued the matter before the Court. Once the records disclose that the party had engaged the advocate to represent the party, it is but natural that the argument in the matter

would be conducted by the advocate for the party and in such circumstances, appearance of the advocate in the matter is of paramount importance. Mere failure on the part of a party to appear before the Court can be of no much consequence.

9. Taking into consideration the above facts therefore, it can be safely said that the appellants' statement that the appellants did not know about the dates of hearing of the matter and the appellants' advocate for no reason whatsoever failed to appear before the Court on the date when the matter was fixed, cannot be disbelieved. At the same time, assertion on the part of the appellants that immediately after having learnt about the order, on inquiry, the appellants applied for certified copy and on obtaining the certified copy of the impugned order, the appeal was filed, also cannot be disbelieved.

10. Added to the above facts, bare perusal of the impugned order discloses that the order in exercise of the power under Section 30 of the Arbitration Act, 1940, hereinafter referred to as "the said Act", is sought to be passed solely on the ground of absence of the appellants before the Learned Single Judge and not because of the award requiring interference in the

exercise of power under Section 30 of the said Act or the grounds on which the Court can interfere in exercise of power under Section 30 of the said Act.

11. For the reasons stated above, therefore, the appellants have not only made out a sufficient case for condonation of delay of 252 days in filing the appeal but has also made out a prima facie case requiring interference in the impugned order.

12. As regards the decision of the Apex Court in **D.Gopinathan Pillai's case (supra)**, undisputedly in the said case, there was a delay of 3320 days in filing the appeal. There is a clear finding in the judgment that the Principal Sub Judge of the Court had condoned the delay of 3320 days without assigning any acceptable reason. Inspite of the said fact while dismissing the appeal against the order condoning the delay, the High Court had merely observed that if the application to set aside the award is ultimately dismissed then the party could not be said to be aggrieved party and if the petition is ultimately allowed and the arbitral award is set aside then a remedy would be to file an appeal under Section 30 of the Arbitration Act, 1940. In the absence of sufficient cause being shown inspite of gross

negligence on the face of record, the Court could not have condoned the delay of 3320 days. Apparently the decision of the Apex Court was in the facts of that particular case which are in no way similar to the facts of the case in hand. Added to above factor is that we are dealing with the matter wherein apparently the Learned Single Judge has purportedly sought to exercise jurisdiction under Section 30 of the said Act totally ignoring the mandate of Section 30 thereof and solely on the ground that the appellants had failed to appear before the Learned Single Judge.

13. For the reasons stated above, therefore, the delay of 252 days in filing the appeal is condoned.

14. As already observed above, the impugned order reads thus:-

> "1. By this petition filed under Section 30 of the Arbitration and Conciliation Act, 1940, the petitioner challenges the Award passed by the sole Arbitrator. The petitioner in paragraph no.2 of the petition has made averments that the petitioner was not served with any notice of the

arbitration proceedings. The respondents have been served. The learned Counsel appearing for the petitioner undertakes to file affidavit of service within a period of one week from today. The respondents have chosen to remain absent. They have not filed any reply controverting the statement made in paragraph 2 of the petition. In the absence of any denial, the averments in paragraph 2 of the petition are to be accepted at face value. Therefore, the Award which is made without service of notice of the arbitration proceedings, is required to be set aside. The petition is therefore, granted in terms of prayer clause (b).

. No order as to costs.

. The petition is disposed of."

15. Apparently, the Learned Single Judge has sought to set aside the Award in exercise of power under Section 30 of the said Act solely on the ground

that the appellants inspite of being served had failed to appear before the Court and in the absence of any denial, the averments made in the petition by the petitioner before the Learned Single Judge are required to be accepted at their face value. With utmost respect, we are unable to sustain the said finding.

16. Section 30 of the said Act provides as under:-

> "30. Grounds for setting aside award.- An award shall not be set aside except on one or more of the following grounds, namely:
>
> (a) that an arbitrator or umpire has misconducted himself or the proceedings;
>
> (b) that an award has been made after the issue of an order by the Court superseding the arbitration or after arbitration proceedings have become invalid under Sec.35;

(c) that an award has been improperly procured or is otherwise invalid."

17. Plain reading of Section 30 of the said Act would disclose that the award shall not be set aside except on one or more grounds mentioned in the said section. In other words, the failure on the part of the appellants to appear before the Court is no ground for interference under Section 30 of the said Act. Merely because the appellants herein, respondents in the petition, failed to contest the contention sought to be raised by filing counter or reply to the petition, that by itself also would not be a ground to set aside the award in exercise of powers under Section 30 of the said Act. Before setting aside the award in exercise of powers under the said section, it is necessary for the Court to ascertain on the analysis of the materials including the award as to whether the arbitrator or umpire has misconducted himself or the proceedings, or whether the award has been improperly procured or otherwise invalid, or the award has been made after the issue of an order by the Court superseding the arbitration or after arbitration proceedings having become invalid under Section 35. Except these grounds, as specifically mentioned in the

Section 30 of the said Act, it was not open for the Learned Single Judge to set aside the award merely on the ground of failure on the part of the appellants to deny the averments in the arbitration petition or on account of the appellants' failure to appear before the Learned Single Judge. On this ground itself, the impugned order is liable to be set aside and the matter is to be remanded to the Learned Single Judge to deal with the arbitration petition afresh after hearing the parties and to decide the same in accordance with the provisions of law. Liberty to the appellants/respondents to file reply, if any, to the arbitration petition within 15 days from today.

18. Undoubtedly, on account of the impugned order and the delay having caused in filing the appeal, certain rights have been accrued in favour of the respondent and those rights are sought to be curtailed by this appeal. In these circumstances, therefore, the respondent would be entitled for costs.

19. In the result, therefore, the notice of motion is allowed and the delay of 252 days in filing the appeal is condoned. The appeal is also allowed. The impugned order is hereby set aside, and the matter is remanded to the Learned Single Judge to deal with the

arbitration petition afresh and to decide the same in accordance with the provisions of law and after hearing the parties. Liberty to the appellants to file reply, if any, to the arbitration petition within 15 days from today. The appellants shall pay costs of Rs.10,000/- to the respondent. Payment of costs shall be condition precedent to enable the appellants to file reply before the Learned Single Judge and for being heard in the matter. Order accordingly.

(R.M.S.KHANDEPARKAR, J)

(D.G.KARNIK, J)